Federal Communications Commission

In the Matter of

Implementation of Section 621 (a)(1) of the Cable
Communications Policy Act of 1984 as amended
By the cable television Consumer Protection and
Competition Act of 1992 MB Docket No. 05-311

COMMENTS

Introduction

The Federal Communications Commission ("Commission") has asked the American public to comment on whether the franchising process as carried out by local governments works to impede the achievement of the interrelated federal goals of enhanced cable competition and accelerated broadband deployment and, if so, how the Commission should act to address that problem. Speaking as a citizen of the state of Maryland and from a purely consumer perspective, my answer is that the local franchising process has not contributed to cable competition or to the accelerated deployment of broadband technologies. Only the entrepreneurial spirit of the market has led to any headway in creating competitive alternatives. This is not to say that the market has been perfect in its allocation of this service. The market, like an engine that needs tuning, appears to sputter from time to time. At times the captains of the communications industry spend too much time blaming regulation as opposed to creating and deploying the technologies anyway and telling government "see what we can do if you just get out of the way." But even with a sputtering engine I would rather place my bets with the market than actually rely on a franchising process that is more concerned with extracting rents for the purpose of building internal networks versus ensuring expanded telecommunications and broadband delivery for its general populace while enforcing existing consumer protection.

Should the Commission act to address this problem, however? The short answer is also no. It would be a waste of resources to duke it out the issue of franchising with local governments. Besides, local governments do have the valid issue of maintaining their rights-of-way and rather than having that issue lost in the dust of an intergovernmental tier battle, the Commission should not address it. Rather, the Commission should recommend to Congress, as succinctly and in as straight-forward a manner as possible, the elimination of the portion of the statute that allows local governments to grant franchises and extract franchise fees.

Local Franchising Requirements are a Bottleneck to Competition

In general, government regulation is a classic barrier to entry. The time, labor, and financial resources that a potential deliverer of video programming has to expend in order to obtain a franchise have served to keep potential providers out of particular markets. In fairness to local governments, however, the primary impediment to local market entry has little to do with local franchising authority and more to do with capital markets faced by a video programming deliverer and the financial feasibility of entering a market. As long as the benefits of entry exceed the costs of entry, which include franchising requirements and fees, then a cable company or other provider will enter the market.

Economics, however, is all about the margins and at the margin are the regulatory costs that local franchising requirements impose. Although the franchise fees that most cable companies are required to pay are capped at five percent of a cable company's gross revenues, the costs that a cable company faces under local franchise regulation exceed this amount. Regulatory compliance is a day-to-day activity. Cable companies endure the cost of staffing that is required to address local government inquiries. Cable companies may also be faced with the additional costs of providing manpower and facilities to meet public, educational, and governmental ("PEG") access channel requirements. The channel capacity used for delivering PEG access means lost revenue for a cable company since these channels do not generate advertisement or subscription revenues.

Quite frankly I do not see how Maryland consumers benefit from PEG access channels. Relatively few citizens watch these channels. This is not to say that there is no valuable content provided by these channels. For example, government channels provide their citizens with access to government hearings, job notices, and other announcements. Commission rules and should require that local governments explore other alternatives for delivering PEG access information prior to forcing an entrant to provide channel capacity to deliver this content. For example, Commission rules should provide incentives for local governments to explore the purchase and use of low-power television stations and to increase the availability of on demand access to this type of programming via the Internet.

Another onerous cost of franchising is the requirement for cable companies and other video programming deliverers to build institutional networks. This requirement usually results from the franchise agreement negotiated between a local government and a cable operator. These networks provide broadband capacity for intra-governmental communications, whether in the form of voice, graphics, video, or data. In some cases a cable company may recoup these costs from imposing a negotiated fee or surcharge on its subscribers. Ironically, while a minority of a jurisdiction's citizens may be paying for the building of these networks through a franchise fee, there is the very high probability that none of its citizens may even have access to these institutional networks simply because they are not for public use. Why should I pay for an institutional network that I will not use? I can see paying for public safety services or even for certain social services. The opportunity for benefit by the public is always there with public safety or social services but not with institutional networks.

I submit that local governments should seek operational efficiency in communications. Hopefully the benefit will flow to its citizens because of the local government's enhanced capacity to communicate. Rather than extort a network out of a cable operator, however, why not subject institutional networks to public bid. This process may result in local governments spending less money and achieving the same results.

Recognition of Cable Operators as Information Service Providers

The biggest impediment against competition in the distribution of video programming and the deployment of broadband is not regulation of the cable industry but the failure of regulatory philosophy to keep pace with the realities of technology. Providers of video programming currently act, for the most part, as distributors of information; much like a telephone company acts as a distributor of voice messages. The advent of Internet television, however, puts cable companies and other deliverers of video content in a position to be information service providers and to be regulated as such. Commission rules should provide incentives for video programming deliverers to configure their networks for the delivery of video programming via Internet protocol.

The primary advantage of delivery of video programming via Internet protocol for consumers has to do with choice. For example, by providing video programming in the same manner that information service providers deliver traditional Internet content, the debate over a la carte delivery of video programming will be put to rest. I need not wait till next week to see episode three of *24*. I can click on that episode immediately after seeing episode one.

The other advantage is for the video content deliverer. If consumers are simply accessing video content online, a deliverer of content can start laying a foundation for escaping cable regulation. I believe that cable companies could start doing this in a relatively short period of time. The main impediment is that their distribution networks have them tethered to rights-of-way and other franchising requirements imposed by a local franchising authority. Spinning off their distribution networks may be one solution. If Comcast no longer owns the distribution facilities running over or under public rights-of-way, then the company is not subject to franchise fees that eat up five to eight percent of its revenues. Consumers may also obtain a benefit from this scenario as well. While it cannot be guaranteed, at least in theory there is an opportunity for consumers to experience a reduction in prices.